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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-829

LEILA MOURNING,
Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I.

The Federal Reserve Board Was Authorized To Prescribe The Four Instalment Rule.

The central issue in the instant case is the nature of the rule making power conferred upon the Federal Reserve Board by 15 U.S.C. § 1604. That section specifically authorizes the Board to prescribe regulations to prevent circumvention or evasion of the Act, and further authorizes regulations to effectuate its purposes. The expressly stated

purpose of the Act is "to assure a meaningful disclosure of credit terms", and is in no way limited to credit which happens to involve a finance charge.

Defendant adduces authorities for such general propositions as that administrative agencies cannot alter the meaning of criminal statutes, *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U.S. 284 (1954); that the power to draw geographical lines does not entail the power to make other distinctions, *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607 (1944); and that the power to make regulations to carry out a statute does not include the power to amend it, *Miller* v. *United States,* 294 U.S. 435 (1935). In the cases relied on by defendant, however, the invalidated regulations did not rest upon grants of authority in any way similar to 15 U.S.C. § 1604. In *Federal Communications Commission* v. *American Broadcasting Co.,* the Commission had no express rule making authority whatever; its authority was limited to a presumed inherent power to enforce any existing criminal provision and to clarify its meaning. 347 U.S. 288, 290 n.7. *Addison* v. *Holly Hill Fruit Products,* involved no broad rule making authority, only a statute empowering the Administrator to define the geographical areas within which the Fair Labor Standards Act would be inapplicable. The fact that that authority did not permit distinctions based on the size of an employer casts little light on the meaning of § 1604. In *Miller* v. *United States,* the Director of the Bureau of Veterans Affairs sought to use his authority to carry out the purposes of the World War Veterans Act to define "total disability" to include certain specific types of injuries. But the Director's power in that case was expressly limited in three ways not present in section 1604—the rules and regulations had to be consistent with the substantive provisions of the Act, the rules had to aid the

administration, execution and enforcement of those provisions, and the Act itself contained no general statement of purpose whatever.[1]

The interpretation which defendant would place on section 1604 can best be divined from what defendant states the Federal Reserve Board *could* do thereunder. Defendant suggests it would be entirely proper for the Board to establish "rebuttable presumptions as to both the existence and the amount of finance charges" to aid private plaintiffs suing in the Federal courts and alleging hidden finance charges. Defendant's proposal, of course, goes beyond the literal command of the statute. Section 1640, authorizing private actions, does not reverse the usual rule that the burden of proof must be met by the plaintiff. The statute does provide several express exceptions to this rule, §§1640(c) (d), but that urged by defendant is not among them. Defendant does not explain why the Board could promulgate for use in the federal courts an evidentiary rule not found in the Act itself, but could not promulgate a disclosure rule not contained in the Act. Defendant manifestly believes that a presumption would be a more effective answer to hidden finance charges than disclosure, but that choice of method is delegated under the statute to the Federal Reserve Board.

Defendant urges at length that the purpose of the Truth in Lending Act as shown by its legislative history was to require disclosure of finance charges. But the legislative history quoted cannot override the express statement of

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[1] 40 Stat. 398, 399 "That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes. . . ."

purpose in section 1601 which makes no mention of finance charges:

> It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

Even to the extent that the Congressional purpose was to inform consumers about the amount of finance charges, that does not mean that the only method which Congress would tolerate for providing that information was requiring disclosures by creditors who did in fact impose finance charges.

II.

The Judgment of the Court of Appeals Should Not Be Sustained On Other Grounds.

This Court granted certiorari to decide the validity of the four installment rule, a question of great import to the continued vitality of the Truth in Lending Act. The additional grounds urged by defendant in support of the judgment of the Court of Appeals were not ruled on by that court, involve complicated questions of fact, and lack the importance of the question which this Court granted a hearing to decide. Plaintiff first maintains that these additional arguments are sufficiently insubstantial to warrant summary rejection by this Court. At the least, should the Court uphold the validity of the four installment rule but conclude that detailed consideration of these other questions is warranted, it should "decline to address them in the first instance," and the case should be remanded to the Fifth Circuit Court of Appeals. *Branzburg* v. *Hayes*, —— U.S. ——, 33 L.Ed.2d 626, 655 (1972); *N.L.R.B.* v. *Scrivener*, 405 U.S. 117, 126 (1972).

A. The Imposition of a Finance Charge Is Not a Precondition of Recovery Under Section 1640(a).

Section 1640(a) provides in part:

> (a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to . . . (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than \$100 nor greater than \$1,000.

Defendant contends that this section only provides for damages when and if a finance charge is in fact imposed.

Defendant's contention flies in the face of the literal language of the section. Liability is imposed on "*any* creditor," not "any creditor who imposed a finance charge"; damages are owed to "*any* consumer" not "any consumer on whom a finance charge is imposed"; the section deals with non-disclosure of "*any* information," not "any information in connection with a transaction in which a finance charge was imposed." Defendant urges that Congress, having deliberately refused to place a requirement of the imposition of a finance charge in the first part of section 1640(a), secreted it by the implications in subsection (1). This construction can only be upheld if we ignore the literal meaning of the words "liability under this paragraph shall not be less than \$100," and assume that, although it used the word "except," Congress did not intend to create an exception to any implied requirement of a finance charge arguably inherent in the phrase, "twice the amount of the finance charge."

The legislative history of section 1640(a) reveals no intent or suggestion that recovery be limited to persons upon whom finance charges have been imposed. The House and Senate Committee reports on the Act both note the existence of a "minimum" penalty of $100, without stating that the imposition of that minimum is conditioned upon the presence of a finance charge. S. Rep. No. 392, 90th Cong., 1st Sess. 9 (1967).[2] H. Rep. No. 1040, 90th Cong., 1st Sess. 19 (1968).[3] The phrases used by the House and Senate committees to describe the civil litigant entitled to damages, "an aggrieved debtor"[4] and "the consumer",[5] suggest that the committees had in mind as plaintiffs *any* non-commercial party engaged in a transaction with a creditor. The only detailed exposition of who could bring a civil action is found in a letter to the Senate Banking and Commerce Committee from the Attorney General suggesting some changes of language eventually adopted by that Committee and the Congress:

> Section 7(a) [1640(a)] of the bill provides that "any creditor who in connection with any credit transaction fails to disclose to any person any information in violation of this act . . . shall be liable in the amount of $100 . . ."
>
> This language may not indicate with precision who may sue the creditor for the civil penalty, in that it

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[2] "Any creditor who fails to disclose the required information would be subject to a civil action with a penalty of twice the finance charge. *However*, the minimum penalty would be $100 and the maximum penalty would be $1,000."

[3] "Any creditor failing to disclose the required information would be subject to a civil suit with a penalty equal to twice the finance charge, with a minimum penalty of $100 and a maximum penalty not to exceed $1,000 on any individual credit transaction."

[4] H. Rep. No. 1040, 90th Cong., 1st Sess. 19 (1967).

[5] S. Rep. No. 392, 90th Cong., 1st Sess., 9, 21 (1968).

> refers to 'any person' to whom information is not disclosed in connection with a credit transaction. It would appear that the suit should be limited to *the person to whom the credit was actually extended without the required disclosures,* that is, the same person referred to in Section 4 [sections 1637-1639] of the statute.[6]

Plaintiff is, of course, a person to whom credit was extended without the required disclosures. The interpretation of a statute given to it publicly by administrative officials at or prior to its enactment is of course entitled to substantial weight. *Daniels* v. *United States,* 210 F. Supp. 942 (D. Mont. 1962).

Defendant's argument that a finance charge is a precondition of Section 1640(a) damages again proves too much. If that argument were upheld, it would literally repeal §1640(a) with regard to the whole class of loan, instalment, or open end credit contracts under which a finance charge could have been, but was not in fact, imposed. See Resp. Br. 13. Moreover such a construction would defeat the Board's purpose in promulgating the four instalment rule. Under defendant's construction of section 1640(a) the instant contract would violate the law on its face, but a private plaintiff could win neither statutory damages nor legal fees without proving the existence of a hidden finance charge. The difficulty of such proof, which the Board sought to avoid, would deter private actions such as this one and frustrate Congress's policy of securing enforcement through litigation commenced by private attorneys general.

Had Congress intended to limit civil sanctions to credit transactions involving a finance charge, it would have done

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[6] Hearings Before a Subcommittee of the Senate Banking and Currency Committee on S. 5, 90th Cong., 1st Sess. (1967), p. 29.

so expressly. Thus the House Banking and Currency Committee explicitly modified the original version of H.R. 11601 by making the civil penalty provision inapplicable to credit advertising violations.[7] "Where express exceptions are made the inference is a strong one that no other exceptions were intended." *United States* v. *City National Bank of Duluth,* 31 F. Supp. 530, 535 (D. Minn., 1939). Exceptions, such as that sought by defendant to section 1640(a), should not be implied in the absence of a clearly expressed Congressional purpose to exclude certain activities from the coverage of the law. Such an implied exception would, moreover, be inconsistent with the established policy of broadly construing remedial laws. *Peyton* v. *Rowe,* 391 U.S. 54, 65 (1968).

Defendant urges that in interpreting Section 1640 the court should use the statutory definition of "creditor" rather than the definition of "creditor" contained in the regulations. Def. Br. 35. The Board, however, indicated no desire to limit the use of its definition to any one section, and defendant offers no criterion for deciding which

[7] H. Rep. No. 1040, 90th Cong., 1st Sess. (1968), 19 ("[T]he bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement with the disclosure requirements of the bill, would attempt to seek civil penalties."); 114 Cong. Rec. 1427 (1968) (Congressman Patman, chairman of the House Banking and Currency Committee, reiterated, "It should be noted that while credit advertising is covered under certain of the disclosure provisions of the bill, such advertising cannot provide the basis for a civil suit. This exemption has been written into the bill by your committee to avoid the possibility that anyone seeing an advertisement not complying with disclosure requirements would attempt to seek civil penalties." Section 1640(a) as enacted provides civil penalties for violations "under this part," which means Part A of the law, §§1601-1641. Credit advertising is regulated under Part B, §§1661-1669. Of course plaintiff is, by contrast, "a party to an actual transaction."

definition should be used in the more than thirty other instances in which the term "creditor" appears in the statute.

The arguments that Section 1640(a) is penal in nature, and that the imposition of a finance charge is a precondition of liability, were considered in detail and expressly rejected in *Ratner* v. *Chemical Bank New York Trust Company*, 329 F. Supp. 270 (S.D., N.Y. 1971). The conclusions reached by the District Court in *Ratner* were manifestly correct and should be adopted by this Court.

B. The District Court's Finding That FPS Extended Credit Should Be Upheld.

The District Court ruled, based upon the evidence before it, that defendant had extended credit to plaintiff. That finding should not be reversed unless it was clearly erroneous. F.R.Civ. Proc. 52(a).

Defendant urges first that the instant contract did not involve an extension of credit because FPS was only obliged to deliver the goods after the customer had paid for them. This analysis of the contractual arrangement is completely at odds with the uncontroverted evidence presented to the District Court and that Court's findings. First, FPS is not itself a magazine publisher and does not itself supply customers with magazines or any other goods. Rather, in return for a customer's promise to pay, FPS contracts with third party publishers to enter subscriptions as desired by its customers.[4] Second, FPS does not perform piecemeal by contracting with the publishers periodically to provide magazines already paid for. Once the initial agreement with a customer is signed, FPS con-

[4] See e.g., Answer to Second Amended Complaint, App. p. 9; Defendant's Memorandum in Support of Motion for Summary Judgment, p. 2.

tracts with the publishers in advance to provide all the magazines over a period of years and unconditionally obligates itself to pay the publisher for those magazines.[9] Third, FPS actually pays the publishers in advance for the magazines to be delivered to a customer.[10] On the basis of this evidence the District Court concluded that plaintiff received, not merely a promise that FPS would itself deliver magazines after she paid for them, but "a *present* contract right—a subscription, in exchange for a promise to pay a certain sum in more than four installments." (App. p. 34) This finding and the evidence recited

[9] On December 16, 1969, FPS wrote to plaintiff, "After making the terms of our contract clear to you, we went ahead in good faith and had your subscriptions entered for the entire periods you had agreed to take." On December 24, 1969, FPS wrote her, "Again, let me remind you that we have ordered these magazines in advance and that you have incurred an obligation to repay us." (App. 20-21). On April 9, 1970, FPS's manager wrote to plaintiff's counsel:

> Whereas, FPS, acts initially as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier, and co-guarantor of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refund in part or in full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract until fullfilment of said terms in the aforementioned contract result in mutual resolve of liability. (App. p. 14)

FPS admitted all three letters were sent to plaintiff, but denied that its manager was authorized to send the letter of April 9, 1970.

[10] See the letter of December 24, 1969, *supra* (reference to repayment), letter of April 9, 1970 (reference to full investment and absence of refund to FPS from publisher). In its Answer, defendant averred that under its arrangement with "most" publishers it reimbursed the publisher periodically during the full term of the subscription. (App. p. 9.) This averment, while inconsistent with the April 9, 1970 assertion of "full" investment, is consistent with the December 24, 1969 claim that FPS was prepaying for magazines. FPS itself offered no evidence on this question before the District Court.

clearly support the District Court's conclusion that credit was extended even under defendant's own standards.

The District Court also concluded that the contract must be held to involve the extension of credit because the defendant itself so regarded it and so described it to plaintiff. (App. 34) Defendant urges, as it did without success in the District Court, that the relevant evidence suggests only that the relationship between itself and plaintiff *became* a creditor-debtor relationship after plaintiff refused to make further payments. The District Court, however, rejected that position, and described defendant's position as considering "the transaction to be a credit transaction." This holding was well founded upon a letter from plaintiff to defendant which stated:

> Again, let me remind you that you have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account,* and as such must be repaid by you on a monthly basis, much as if you had purchased any other type of merchandise on a monthly budget plan. (Letter of December 24, 1969, App. p. 20).[11]

The Defendant did not urge in the District Court and does not appear to urge here that it could successfully claim the contract is not covered by the Truth in Lending Act if it had earlier maintained and informed plaintiff that the transaction itself, and not merely their relationship when payments were withheld, involved an extension of credit.

The arguments asserted by Defendant are so sweeping in their scope as to seriously threaten the effectiveness of the Act. Defendant asserts that solely because it allegedly

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[11] The letter describes the monthly payments, not the overdue sum, as a credit account, and uses the verb "is" not "has become."

did not extend credit it is totally exempt from the Act. The argument does not depend on the absence of a finance charge; defendant claims that it should be allowed to impose a usurious finance charge in contracts such as these with consumers and still refuse to divulge the total price of the goods, the amount of the finance charge, or the annual interest rate. Such a holding by this Court would clearly frustate the purpose of the statute.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed and defendant directed to pay plaintiff statutory damages in the amount of one hundred dollars plus the costs of this action together with a reasonable attorney's fee as required by 15 U.S.C. §1640(a)(2).

Respectfully submitted,

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